



ORANGE COUNTY
COASTKEEPER®

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June 20, 2014

Via email: santaana@waterboards.ca.gov

Regional Water Quality Control Board – Santa Ana Region
Attn: Adam Fischer
3737 Main Street, Suite 500
Riverside, CA 92501

RE: Comments on Draft Orange County Municipal Separate Storm Sewer System (“MS4”) Permit, NPDES Permit No. CAS61080

Dear Mr. Fischer,

Orange County Coastkeeper (“Coastkeeper”) respectfully submits the following comments on the draft Orange County Municipal Separate Storm Sewer System (“MS4”) permit, Tentative Order No. R8-2014-0002 (“Draft Permit”). We appreciate the opportunity to submit these comments to the Regional Water Quality Control Board (“Regional Board”) on the Draft Permit.

BACKGROUND

Urban runoff is the leading source of estuarine pollution in coastal communities and Orange County’s most urgent pollution problem.¹ Arguably, it is the most difficult to solve. Each storm event causes storm water contaminated with bacteria, metals, and other pollutants through Orange County’s streams, creeks, rivers and beaches in harmful amounts. Polluted urban runoff results in elevated bacteria levels and increased illness among swimmers and surfers, and the association between heavy precipitation (leading to increased runoff) and waterborne disease outbreaks is well documented.² Human contact with waters contaminated with storm water runoff can lead to chills, fever, ear infections and discharge, coughing and respiratory ailments, vomiting, diarrhea and other gastrointestinal illness, and skin rashes.³

Controlling storm water pollution originating from Orange County’s MS4 system will result in statewide economic and social benefits. Orange County is one of the principal tourism destinations in the nation’s largest ocean economy. According to the California Resources Agency, the state ranks “number one

¹ Santa Ana Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R8-2002-0010, Fact Sheet, II; NPDES Permit No. CAS618030, January 18, 2002; *see also* US Environmental Protection Agency, 1999, 40 CFR Parts 9, 122, 123, 124, National Pollution Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule, 64 FR 68727.

² Curriero et al., (August 2001) *The Association Between Extreme Precipitation and Waterborne Disease Outbreaks in the United States, 1949-1994*, American Journal of Public Health, 91:8 1194-1199.

³ See, e.g., Haile, et al. (1999) *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Epidemiology 10(4):355-63, at 356-57; Haile, R. W. et al (1996) *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay*, Santa Monica Bay Restoration Project, 70 pp, at 3.

overall for both employment and gross state products....⁴ One study, which reviewed data originating from Orange County, estimated that local beachgoers in California spend as much as \$9.5 billion annually and the non-market value associated with beach-going in Southern California alone may be as high as \$2 billion annually.⁵

In a region renowned for its beaches and strong tourism economy, polluted runoff keeps people out of the water and off Orange County beaches for at least 72 hours after a rain event greater than 0.2 inches. As a result, storm water runoff in Orange County's coastal waters causes or contributes to an enormous number of beach closures and advisories each year.⁶ The health impacts and corresponding economic cost to the region caused by high bacteria levels is significant. One study demonstrated that swimming at polluted beaches in Los Angeles and Orange Counties caused between 627,800 and 1,479,200 excess cases of gastroenteritis per year, resulting in annual health costs of between \$21 and \$51 million, or \$176 and \$414 million per year (depending on whether only market costs or both market and non-market costs, such as willingness-to-pay not to get sick, were considered).⁷

Orange County's copermittees cannot solve this problem in isolation. It will take municipalities partnering with businesses, environmental groups, planning groups, fishing clubs, and even the local PTA for us to tackle these pollution issues and restore our waters to a healthy state where they support all designated beneficial uses. Because we can only solve our urban runoff problem with help and buy-in from municipalities, businesses and residents working together, the Draft Permit must foster a watershed-based planning process that involves the whole community in achieving a healthier watershed.

Coastkeeper believes the Draft Permit successfully improves upon the existing permit in numerous way, including mere readability. However, we are concerned that in other aspects, the Draft Permit fails to meet the requirements of the federal Clean Water Act and California's Porter Cologne Act, and is otherwise inconsistent with both state and federal law. We strongly encourage the Regional Board to revise the Draft Permit in accordance to the recommendations detailed below. Working with the Regional Board, Coastkeeper hopes a modified Draft Permit can be adopted sometime during fall 2014 and work can begin on the consolidated Inland Empire MS4 permit later this year.

COMMENTS

I. Section IV.A of the Draft Permit Creates an Illegal Safe Harbor that Violates Federal Anti-Backsliding Requirements.

Co-permittees have requested, and the Regional Board has included, a "safe harbor" provision to the existing MS4 permit's Receiving Water Limitation ("RWL") section. Since 2002, Orange County's MS4 permits have included language to "ensure that discharges from MS4 systems do not cause or contribute

⁴ Kildow, J. and Colgan, C.S. (2005) National Ocean Economics Program, California's Ocean Economy: A Report to the Resources Agency, State of California, at 1.

⁵ Pendleton, L. (July 2004) *Harvesting Ocean Observing Technologies to Improve Beach Management: Estimating the Regional Economic Benefits of Improvements in the California Coastal Ocean Observing System*, Arlington, VA: Ocean. Unnumbered Report. July; see also, Chapman, D. and Hanemann, M. (2001) *Environmental Damages in Court: the American Trader Case*, in *The Law and Economics of the Environment* (Hayes, edit.), pp. 319-367 (estimating a "consumer surplus" of \$8.16 to \$60.79 per visit for each beachgoer).

⁶ NRDC (2012) *Testing the Waters: A Guide to Water Quality at Vacation Beaches*, at California Chapter Summary. Orange County reported 761 total closing or advisory days in 2011 from all sources. This number does not include days of county-wide rain advisory events. Reported closing or advisory days are for events lasting six consecutive weeks or less. Available at <http://www.nrdc.org/water/oceans/ttw/ttw2012.pdf>

⁷ Given, S., et al. (2006) *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches*, *Environmental Science & Technology* 40(16): 4851-4858, at 4856.

to violations of applicable water quality standards in receiving waters.”⁸ Rather than maintaining the existing MS4 permit’s clear prohibition against discharges that cause or contribute to an exceedance of water quality standards, the Draft Permit exempts compliance with RWL for Co-permittees that prepare and submit a draft plan. These safe harbors violate multiple provisions of the Clean Water Act and other state and federal regulations, rendering the Draft Permit unlawful.

The Draft Permit creates a “safe harbor” by deeming a permittee to be in compliance with the Draft Permit’s RWLs (which the 2002 and 2009 MS4 permit required compliance with), when a draft plan has been submitted or, if final, is being implemented. The Ninth Circuit defined a “safe harbor” as “the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions.” (Natural Resources Defense Council, Inc., v. County of Los Angeles, 673 F.3d at 897 (rev’d and remanded on other grounds).) Regional Board staff proposes such a “safe harbor” when proposing permittees to prepare and submit draft plans whose goal is to ensure storm water discharges do not cause or contribute to exceedances of RWLs, and that TMDL WLAs are achieved. If a Permittee meets the program requirements for the plan, it is deemed to *legally* comply with the Draft Permit’s RWLs, regardless of whether the RWLs are *actually* achieved. To adopt such language, the Regional Board would necessarily take the position that the Draft Permit excuses exceedances of water quality standards. The result of these draft plans is to render RWLs as inoperative.

The Clean Water Act prohibits renewal permits, like the Draft Permit, from containing weaker standards than those contained in previous permits, unless certain circumstances apply. (See, 33 U.S.C. § 1342(o)(1); 40 C.F.R. § 122.44(l)(1).) The “safe harbors” included in the Draft Permit render RWLs less stringent than the previous permit and do not qualify as exceptions to the federal Clean Water Act anti-backsliding rule. The Draft Permit must require compliance with water quality standards, without a “safe harbor” provision. The State Water Resources Control Board issued a precedential order implementing U.S. EPA’s requirement that permit language contain no such provision.⁹ The 2002 and 2009 Orange County MS4 permits did not include a safe harbor provision, and the Regional Board is precluded from including such a provision here.

Claims by permittees that recent decisions originating from the Ninth Circuit imperil municipalities by exposing permittees to liability for MS4 permit violations if their discharges cause or contribute to an exceedance of water quality standards are false. The prohibition against discharges that cause or contribute to exceedances of water quality standards have been in Orange County’s MS4 permits since 2002. Recent decisions have not created municipal liability, the liability has existed for well over a decade. Throughout this period, the interpretation of RWLs has remained constant and permittees have not been subject to Regional Board or third party enforcement as a result of the existing RWL language. For these reasons, the Regional Board must remove the “safe harbors” in the Draft Permit.

⁸Santa Ana Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R8-2002-0010, Sec. IX.2.; NPDES Permit No. CAS618030, January 18, 2002.

⁹ State Water Resources Control Board, Order No. WQ 99-05, June 17, 1999 (revising receiving water limitations language).

II. The Inclusion of Numeric Action Levels Will Lead to Improved Triggers for Implementation of the Iterative Process

The Draft Permit's Technical Report details widespread chronic deficiencies in co-permittee triggers to initiate the iterative process.¹⁰ Nonexistent or poorly defined performance metrics frustrate program effectiveness assessments and delay improvements in water quality. The Regional Water Quality Control Board – San Diego Region's ("San Diego Regional Board") recently adopted MS4 Permit included numeric action levels to foster a more robust iterative process.¹¹ Adopting the same, or similar, process through the Draft Permit could foster a more robust countywide iterative process.

As the Draft Permit's Technical Report describes, the iterative process detailed in WQ 99-05 has "never been initiated before in the Santa Ana Region in spite of the Co-permittee's collection of substantial water quality data."¹² The failure of the iterative process to be formally initiated in the manner designed in WQ 99-05, and embraced in prior MS4 permits by the Regional Board, indicates the need for objective standards. The San Diego Regional Board established storm water and non-stormwater numeric action levels to be incorporated into the Water Quality Improvement Plans for south Orange County.¹³ Numeric action levels exist for non-stormwater discharges from MS4s to: ocean surf zones; harbors, bays, lagoons, and estuaries; and inland surface waters.¹⁴ Storm water discharges from MS4s to receiving waters exist as well.¹⁵ The inclusion of objective standards, such as numeric action levels, by the Regional Board would be consistent with permit requirements currently placed on Orange County by the San Diego Regional Board and would assist Co-permittee's in initiating the iterative process.

III. Areas of Draft Permit Improvement Based on a Review of the San Diego Regional Board's MS4 Permits

As a county divided between two Regional Boards, Orange County is subject to more than one MS4 permit. Consequently, the differences between the two permits should be considered upon permit renewal to analyze whether those differences should be harmonized. Coastkeeper makes the recommendations below based on our review of the successful portions of the San Diego Regional Board's MS4 permits that have been absent from permits adopted by this Regional Board.

Section X of the Draft Permit requires Co-permittees to maintain an inventory of commercial sites within their jurisdiction who are engaged in commercial activities. Section X.2 describes the information necessary to be included in the inventory. Section X.3 lists the types of activities that a site would automatically qualify for listing in the inventory. The San Diego Regional Board adopted MS4 permit requirements requiring additional detail in the inventory that provides staff and the public with valuable

¹⁰ Santa Ana Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R8-2014-0002, Draft Technical Report, Sec. VIII.A.; NPDES Permit No. CAS618030.

¹¹ See San Diego Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R9-2013-0001, Sec. II.C.; NPDES Permit No. CAS0109266, May 8, 2013.

¹² Santa Ana Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R8-2014-0002, Draft Technical Report, Sec. VIII.A.; NPDES Permit No. CAS618030.

¹³ San Diego Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R9-2013-0001, Sec. II.C.; NPDES Permit No. CAS0109266, May 8, 2013.

¹⁴ *Id.*

¹⁵ *Id.*

information on facilities that could contribute significant pollutant loads to the MS4 system. In response, the Regional Board should modify Section X.2 of the Draft Permit to add: “pollutants potentially generated by the site/source”; “whether the site is tributary to 303(d) water body segment and whether the facility generates pollutants for which the water body segment is impaired”; and a “narrative description including SIC codes which best reflects the principal products or services provided by each facility.”¹⁶ Section X.3 of the Draft Permit should be modified to include: “automobile (or other vehicle) parking lots and storage facilities; cement mixing or cutting; equipment repair, maintenance, fueling or cleaning; mobile auto or other vehicle washing; mobile drape, carpet or furniture cleaning; power washing services; and retail or wholesale fueling”.¹⁷ Requiring more complete information to the Co-permittees will allow for a more efficient municipal inspection program of commercial sites and promote a more tailored response to water quality impairments in the event specific commercial sites can be more easily isolated for further inspections.

Section XIV.A.1 of the Draft Permit lists the facilities that must be included in the inventory of municipal facilities/activities that have the potential to discharge pollutants in urban runoff. Recent San Diego Regional Board MS4 permits have included, and Coastkeeper believes the Draft Permit should include, public golf courses, public swimming pools, special event venues, and landscape maintenance on municipal property.

Section XIV.D.2 of the Draft Permit lists sites owned or controlled by Co-permittees which must be categorized as “high priority” fixed facility sites. Co-permittee’s must inspect “high priority” sites at least annually.¹⁸ Coastkeeper strongly encourages the Regional Board to modify Section XIV.D.2 of the Draft Permit to include fuel storage areas, and other facilities at which chemicals or materials have a high potential to be discharged as storm water.

Section XIV.F of the Draft Permit seeks to control and reduce the use of unwarranted or excessive application of fertilizer and pesticides at facilities owned or controlled by Co-permittees. To achieve this goal, the Regional Board relies heavily on integrated pest management to control chemical and fertilizer storm water loading. In addition to the use of integrated pest management, U.S. EPA guidance references non-chemical solutions, including the selection of native vegetation that is “naturally adapted to local conditions and therefore requires fewer chemical and water inputs, reducing exposure of the chemicals to water by scheduling application according to weather forecasts and plant needs.”¹⁹ U.S. EPA derived this guidance after it reviewed the prior San Diego Regional Board’s MS4 permit for San Diego County as a model for Pesticide, Herbicide, and Fertilizer Application and Management practices.²⁰ Based on U.S. EPA guidance, the Regional Board should first modify Section XIV.F of the Draft Permit to specifically include herbicide. Second, the Regional Board should stress non-chemical integrated pest management solutions, such as the use of native plants, reducing grass mowing to allow for greater pollutant removal, and limiting the areas of fertilizer application near storm drains. In addition to contributing to a more

¹⁶ San Diego Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R9-2009-0002, Sec. F.3.b(1)(a); NPDES Permit No. CAS0108740, December 16, 2009.

¹⁷ *Id.* at Sec. F.3.b(1)(a)(i)

¹⁸ See Santa Ana Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R8-2014-0002, Sec. XIV.D.1.a; NPDES Permit No. CAS618030.

¹⁹ U.S. Environmental Protection Agency. 2010. MS4 Permit Improvement Guide. EPA 833-R-10-001, Washington, DC: Office of Wastewater Management, 82-3

²⁰ *Id.*, see also San Diego Regional Water Quality Control Board, Orange County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R9-2009-0002, Sec. F.3(a)(3); NPDES Permit No. CAS0108740, December 16, 2009.

effective program to control landscape related pollutants, these modifications will reduce water demand and encourage the use of drought tolerant or native landscapes at municipal facilities.

In conclusion, Coastkeeper appreciates this opportunity to comment on the Draft Permit. Please feel free to contact me directly at 714-850-1965 ext. 307 or at colin@coastkeeper.org with any questions or concerns you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Colin Kelly", with a stylized flourish at the end.

Colin Kelly
Staff Attorney
Orange County Coastkeeper